

- A **GOVINDASAMY MUTHULINGAM**
- v.
- OOI KEE CHYE & ANOR**
- B HIGH COURT MALAYA, PENANG
 CHEW SOO HO JC
 [CIVIL SUIT NO: 22-341-2005]
 10 MAY 2011
- C **CIVIL PROCEDURE:** *Pleadings - Fraud - Failure to plead - Whether constituted fundamental flaw in pleadings - Rules of the High Court 1980, O. 18 r. 12(1)*
- D **LAND LAW:** *Indefeasibility of title and interests - Registration - Conferment of ownership - Whether local authority had power to confer ownership of land and title - Whether payment of assessment rates constituted proof of title*
- E **LAND LAW:** *Indefeasibility of title and interests - Registration - Effect of - Whether registration defeated all prior unregistered claims - Whether circumstances under s. 340(2) of the National Land Code proved to defeat registration - National Land Code, s. 340(1), (2), (3)*
- F The plaintiff's pleaded case herein was that the land in question here had been given to him as compensation by the second defendant, to vacate the premises he was then occupying. He therefore claimed that the transfer of the land by the second defendant to the first defendant was ineffective and void and prayed for specific performance. On the other hand, in his evidence, the plaintiff alleged that he purchased the land in 1974
- G from the second defendant and had paid in full. However, the sale and purchase agreement and all other relevant documents were said to be missing during a flood in 1990. Whereas, the first defendant entered into a sale and purchase agreement with the second defendant for the purchase of the land for which he had
- H settled in full and became the registered proprietor of the same. The second defendant contended that the plaintiff had instituted a civil action identical to the present case (the first suit), and it had already been struck out by the court and hence, submitted that the present action was res judicata. It was further contended
- I that the present suit was also barred by the Limitation Act 1953. The defendants contended that fraud was not specifically pleaded

and the facts pleaded were entirely inconsistent with the evidence led by the plaintiff in the trial. Further, the defendants contended that the declaration sought by the plaintiff was not an appropriate remedy when there were adequate alternative remedies.

Held (dismissing the plaintiff's claim with costs)

- (1) The court must reject the plaintiff's unpleaded case and since no evidence was led to prove the pleaded case, the plaintiff had failed to prove his case against the defendants. Further, under the National Land Code, the conferment of ownership of land is by registration which confers indefeasible title or interest on the person or body being so registered. The local authority is not the proper authority and has no power to confer the ownership of land and its title. Hence, the plaintiff's reliance on the letter of payment of assessment rates did not confer ownership over the land. (para 10)
- (2) There was not an iota of fact adduced to show any collusion between the first and second defendants. The documents tendered showed unequivocally that the first defendant was the sole registered proprietor of the said land. Further, the failure by the plaintiff to plead particulars of fraud in the transfer of the land to the first defendant, in compliance with O. 18 r. 12(1) of the Rules of the High Court 1980, was a fundamental flaw in the plaintiff's pleadings. (paras 12 & 14)
- (3) The indefeasible title can only be defeated pursuant to s. 340(3) of the NLC under the three circumstances set out in s. 340(2) of the NLC. The first defendant had been able to show with the relevant documents that he had purchased the said land and as a consequence, his name was duly registered as the sole proprietor of the said land. The effect of the registration would defeat all prior unregistered claims. The failure of the plaintiff to prove any of the circumstances under s. 340(2) of the NLC rendered the first defendant's title to and his interest in the land was indefeasible pursuant to s. 340(1) of the NLC. (paras 17 & 18)
- (4) The plaintiff's cause of action in the first suit as compared to the current suit was substantially based on the same facts. The allegation of collusion or fraud which had not been so pleaded in the first suit should and ought to have been within the contemplation of the plaintiff. Thus, whether he had

- A deliberately or advertently failed to plead such cause of action did not prevent the doctrine of *res judicata* from being invoked. Further, the failure by the plaintiff to file an appeal or apply to set aside the decision could only be construed as his acceptance of the decision in the first suit as true. In the
- B circumstances, his filing of the current suit is *res judicata*. (para 22)

(5) The finding on the limitation period was inconsequential as the plaintiff, as a whole, had failed to prove his claim against the defendants. (para 27)

C

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC (*refd*)

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC (*foll*)

D

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA (*dist*)

Chemfert Sdn Bhd & Anor v. Lim Hua [2010] 7 CLJ 491 CA (*refd*)

Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC (*refd*)

E

Muthammah Govindan & Anor v. Masri Mohamed HC [2000] 5 MLJ 518 (*refd*)

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC (*refd*)

Tan Leng Choo & Ors v. Law Teck Huat [2008] 1 LNS 568 CA (*refd*)

Tetuan Tokoyaki Property Sdn Bhd v. Sam Kok Sang & Ors [2001] 4 CLJ 97 HC (*refd*)

F

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC (*refd*)

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC (*refd*)

Legislation referred to:

Limitation Act 1953, ss. 6(1)(a), 9(1), 29

G

National Land Code, ss. 340(1), (2), (3)

Rules of the High Court 1980, O. 18 rr. 12(1), 19(1)(b), (d)

For the plaintiff - Paramjit Singh; M/s Paramjit & Co

For the defendant - Simon Murali; M/s Lio & Partners

H

Reported by S Barathi

JUDGMENT

Chew Soo Ho JC:

I

Brief Facts

[1] Plaintiff's claim against the defendants is for a declaration that the transfer of the land known as Lot No. 3224, Bandar Gelugor, Daerah Timur Laut, Pulau Pinang held under Grant No.

GRN 41642 (hereinafter referred to as “the said land”) with a premises known as No. 34, Jalan 7, Minden Heights, Sungai Gelugor, 11700 Gelugor, Pulau Pinang (hereinafter referred to as “the said premises”), by the 2nd defendant to the 1st defendant is ineffective and void. He also prayed for specific performance of the said land which he pleaded that it was given to him as compensation by the 2nd defendant, *inter alia*.

[2] Plaintiff alleged in evidence, however that sometime in 1974, he had purchased the said land from the 2nd defendant for the price of RM2,900 which he had paid in full but the alleged agreement for the sale and purchase and all other relevant documents in relation to the said land and the said premises were missing during a flood in the year 1990. In the year 2004, the plaintiff came to know that the 2nd defendant had through a conspiracy and fraud transferred the said land to the 1st defendant. A police report was lodged to that effect *vide* Jelutong Report No. 8843/04. A caveat had subsequently been lodged to protect his interest over the said land.

[3] The 1st defendant had entered into a Sale and Purchase Agreement with the 2nd defendant for the purchase of the said land on 15 December 2003 at the price of RM500,000 for which he had settled in full. He became the registered proprietor since 6 April 2004 and claimed that he is vested with indefeasible title.

[4] The 2nd defendant did not testify by election contending that this action is *res judicata* on ground that the plaintiff had on 14 May 2004 instituted a civil action against the 2nd defendant *vide* Civil Suit No. 22-258-2004 in the Penang High Court (the 1st suit) with the cause of action which is identical to the present suit. The 1st suit was struck out on 15 March 2005 pursuant to an application under O. 18 r. 19(1)(b) and (d) Rules of the High Court 1980 (RHC) dated 20 December 2004 and no appeal was filed by the plaintiff. It was further contended that the present suit is also barred by the Limitation Act 1953.

[5] On the pleadings, the defendants contended that fraud was not specifically pleaded and the facts pleaded were entirely inconsistent with the evidence led by the plaintiff in the trial. Lastly, the defendants contended that the declaration sought by the plaintiff is not an appropriate remedy when there are adequate alternative remedies.

A Issues

[6] From the facts and evidence as well as the submissions by both parties, the broad issues of this case are deduced as follows:

- B** 1. Whether the plaintiff had proved his claims against the defendants of the existence of a contract between himself and the 1st defendant in line with his pleaded case;
- C** 2. Whether there was a collusion between the 1st and 2nd defendants against the plaintiff in the sale and purchase of the said land between the 1st defendant and 2nd defendant resulting in the registration of the 1st defendant as the sole proprietor;
- D** 3. Whether the 1st defendant's title over the said land is indefeasible;
4. In view of plaintiff's 1st suit against the 2nd defendant arising out of the same cause of action, whether it is *res judicata* the present suit; and
- E** 5. Whether plaintiff's action is barred by limitation.

Findings Of The Court**1st Issue**

- F** [7] From the plaintiff's pleadings *vide* bundle A p. 4 of his statement of claim, the material facts of a purported contract shown therein are as stated in para. 4 in the following:

- G** Plaintiff telah diberikan pampasan sekeping hartanah yang dikenali sebagai Lot No. 3224, Bandar Gelugor, Daerah Timur Laut, Pulau Pinang yang dipegang di bawah Geran No. GRN 41642 oleh Defendan pada atau sekitar tahun 1974 sebagai pampasan untuk milikan kosong premis yang diduduki oleh Plaintiff di alamat No. 458 - U, Mukim 13, Sungai Gelugor, Pulau Pinang dan Plaintiff dikehendaki untuk membina rumahnya dengan kos pembinaan sendiri. Hartanah tersebut dikenali sebagai premises
- H** No. 34, Jalan 7, Minden Heights, Sungai Gelugor, 11700 Gelugor, Pulau Pinang.

- I** [8] In brief, the pleaded case of the plaintiff is that he was offered the said land by the 2nd defendant as compensation for him to vacate premises No. 458 - U, Mukim 13, Sungai Gelugor, Penang which he was occupying in 1974 and for him to build his

own house at his own costs on the said land. However, in evidence, *vide* his witness statement exh. P1 Q & A 1 & 2, plaintiff stated that he had in fact bought the said land from the 2nd defendant at the price of RM2,900 and moved to the said premises around 1974. He further claimed to have the agreement of sale and purchase, other related documents as well as receipts of payments but except for two of the receipts, *vide* bundle B p. 1 with the amount of RM30 each dated 2 October 1978 and 1980 respectively which did not mention anything about the sale and purchase of the said land, those documents were all missing during the 1990 flood. This is an apparent total twist from his pleaded case. Going by that, the plaintiff had put forward two sets of his own case before the court ie, *vide* his pleadings which he alleged that the said land was given to him as compensation when he agreed to vacate premises No. 458 - U and *vide* his own evidence-in-chief in court wherein he alleged that he had in fact bought the said land from the 2nd defendant at the price of RM2,900. There was no attempt by the plaintiff to apply to amend his pleadings at any stage. In *Tan Leng Choo & Ors v. Law Teck Huat* [2008] 1 LNS 568, His Lordship Low Hop Bing, JCA has expressed what is trite as to the question of pleadings as follows:

It is trite law that parties are bound by their own pleadings and that a party stands or falls by the four corners of his pleadings ... The Court shall only decide on issues which were pleaded and not otherwise ...

[9] In *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330, the Supreme Court has adopted the observation of law laid down by His Lordship Sharma J in *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42 as follows:

The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

- A [10] Therefore, it is amply clear that this court cannot displace the plaintiff's case in his pleadings which narrated the fact of the 2nd defendant giving him the said land as compensation in consideration of him vacating premises No. 458 - U to give effect to an entirely new case which the plaintiff had not made out in
- B his pleadings ie, that he had in fact bought the said land from the 2nd defendant at the purchase price of RM2,900 but the sale and purchase agreement and related documents were missing in the 1990 flood. Consequently, this court must reject the unpleaded case of the plaintiff and since no evidence was led to prove the
- C pleaded case above, this court must necessarily hold that the plaintiff had failed to prove his case against the defendants. In the absence of all relevant documents relating to the alleged sale and purchase between the plaintiff and the 2nd defendant, the plaintiff relied on the letter dated 4 February 2004 from Majlis
- D Perbandaran Pulau Pinang (bundle B p. 7) to assert that the said premises had been assessed in his name since 1 July 1974 to contend his beneficial interest or ownership of the said land. Learned counsel for the defendants submitted that payment of assessment rates for a premises does not confer ownership over
- E the land on which the premises stands referring to the case of *Tetuan Tokoyaki Property Sdn. Bhd. v. Sam Kok Sang & Ors* [2001] 4 CLJ 97. Under our National Land Code (Act 56 of 1965), the conferment of the ownership of land is by registration which confers indefeasible title or interest on the person or body being
- F so registered: s. 340(1) therein. The local authority like MPPP is not the proper authority and has no power to confer the ownership of land and its title.
- [11] On this 1st issue alone, I hold that the plaintiff had failed to prove his case as pleaded by him and he had also failed to prove his ownership or his beneficial interest of the said land. Save for his bare assertion of a sale and purchase, there is no evidence to prove the existence of a contract between the plaintiff and the 2nd defendant. The plaintiff's case in the circumstances ought to be dismissed. However, for completeness, I shall deliberate on the other issues.
- G
- H

2nd Issue

- I [12] According to para. 7 of the statement of claim, the plaintiff pleaded that on 6 April 2004, the 2nd defendant had by collusion ('muslihat') transferred the said land to the 1st defendant who had

knowledge of the 2nd defendant's obligation to transfer the said land to the plaintiff. However, from the plaintiff's evidence, there is absolutely not an iota of fact adduced to show any collusion between the 1st and 2nd defendant. Evidence of the 1st defendant showed he had never denied that there was a premises standing on the said land but stated that it was a squatter whom the 2nd defendant would evict as 1st defendant bought the said land with vacant possession. Although 1st defendant knew the 2nd defendant before entering into the sale and purchase agreement for the purchase of the said land, there is no evidence that they were good friends as submitted by learned counsel for the plaintiff. Indeed, learned counsel for plaintiff had never cross-examined the relationship between the two defendants. It was from the questions by this court that 1st defendant stated that he knew the 2nd defendant after having been introduced by his friend and he had some dealings with the 2nd defendant in relation to enquiry on land development and future project. 1st defendant asserted that he was unaware that this land could probably have been sold before. Before 1st defendant purchased the said land, he had done a land search which showed that it was free from encumbrances. Bundle C pp. 26-35 shows the Sale & Purchase Agreement (SPA) between the 1st and 2nd defendants; receipts showing the full payment of the purchase price of RM500,000 are as shown in bundle C pp. 36-39 and the Grant No. 41642 for Lot 3224 Bandar Gelugor, Daerah Timur Laut, Pulau Pinang for the said land is as in bundle C pp. 40-44; these documents show unequivocally that 1st defendant is the sole registered proprietor of the said land with an existing charge to Bumiputra-Commerce Bank Berhad. The plaintiff contended that this SPA between the defendants is a sham purchase to defeat the interest of the plaintiff because the 1st defendant did not pay the 10% of the purchase or the deposit in the sum of RM50,000 in full upon the execution of the SPA and that the 1st defendant had purchased the said land "as is where is basis". The 1st defendant explained that he had given two cheques at the material time of the execution with one cheque post-dated for two days. I find the 1st defendant's explanation to be consistent with the two receipts *vide* bundle C pp. 37 and 38 which show that one is dated 15 December 2003, the date of the SPA (as in bundle C p. 34) for RM30,000 and the other is dated 17 December 2003 for the sum of RM15,000 making with up the sum of RM45,000 since the 1st defendant

A

B

C

D

E

F

G

H

I

A had paid cash of RM5,000 on 2 December 2003 as shown in receipt bundle B p. 36. There might be a delay of two days in respect of the cheque for RM15,000 which the 2nd defendant had nevertheless accepted; I do not find anything to indicate that by the mere acceptance of the 2nd cheque for RM15,000 with two days delay, the SPA executed by the parties is a sham. The important fact is that the total deposit sum had been paid. On cl. C of the preamble of the SPA where the 1st defendant is desirous of purchasing the said land on a “as is where is basis”, I am inclined to agree with the submission by learned counsel for the defendants that if there is any dispute over this basis, it is between the 1st and 2nd defendants who are parties in this contract. I do not find in what way that because of the sale and purchase being on ‘as is where is basis”, the SPA is a sham. Anyway, there is no evidence to prove such allegation of the SPA being a sham nor was such fact being pleaded by the plaintiff. Learned counsel for the plaintiff cited the case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 5 MLJ 136 which held *inter alia* that:

E Held,

(3) (per Raus JCA, Hasan JCA concurring) An existence of a sale and purchase agreement and the payment of the purchase price in full could not be the only indicator to show whether a person is a *bona fide* purchaser or otherwise. Other salient features surrounding the sale and purchase agreement must be considered.

...

[13] I have no doubt that in order to determine whether a purchaser is *bona fide* or otherwise, other salient features surrounding the sale and purchase agreement must be considered such as the fact as in *Au Meng Nam*’s case that the plaintiffs were the registered proprietors and two cheats claiming themselves to be the proprietors of the plaintiff’s land entered into the sale and purchase agreement with the 1st defendant and the instrument of transfer was forged. Such facts affect the indefeasibility of the title and ought to be considered. There is however no salient features in the instant case. I do not find plaintiff’s contention sustainable. The same goes with the argument of the plaintiff that there is flaw in compliance with the vacant possession clause ie, cl. 14 in the

SPA where no keys were handed to the 1st defendant by the 2nd defendant. This is a matter between the contracting parties. The crux of this SPA is the sale and purchase of the said land without any inclusion of any premises. The fact that the 1st defendant had been duly registered as the sole proprietor of the said land ultimately upon full payment of the consideration proves undoubtedly that he is the registered owner and is entitled to possession thereof irrespective of whether he was handed over any keys or not.

[14] The plaintiff *vide* his pleadings alleged a collusion ('muslihat') but in evidence, he alleged collusion and fraud in the transfer of the said land to the 1st defendant (see para 4 in P1). However, no particulars of the alleged fraud were pleaded in compliance with O. 18 r. 12(1) of the Rules of the High Court 1980. This is a fundamental flaw in the plaintiff's pleadings. In any event, it is trite that where there is an allegation of fraud in civil proceedings, the standard of proof required must be one of beyond reasonable doubt and not on a balance of probabilities: see *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 FC; *Asean Security Paper Mills Sdn. Bhd. v. CGU Insurance Bhd* [2007] 2 CLJ 1 FC. In the absence of any evidence to prove that the said land had been given to the plaintiff by the 2nd defendant in consideration of the plaintiff delivering vacant possession of premises No. 458 - U, Mukim 13, Sungai Gelugor, Penang, which is the pleaded case of the plaintiff, plaintiff has failed in proving any allegation of fraud beyond reasonable doubt when 2nd defendant sold the said land to the 1st defendant even if this court were to accept the word 'muslihat' or collusion to include fraud since collusion has the meaning of "an agreement to defraud another or to obtain something forbidden by law"; see *Black's Law Dictionary*. I do not find that plaintiff had proved his allegation of collusion between the 1st and 2nd defendants in the registration of the 1st defendant as the registered owner of the said land. Evidence conversely shows that it was a proper sale and purchase between the 1st and 2nd defendants over the said land.

3rd Issue

[15] In *Au Meng Nam (supra)*, His Lordship Raus Sharif JCA (now FCJ) cited the words of His Lordship Abdul Malik Ishak J (now JCA) in *Muthammah v. Masri Mohamed* [2000] 5 MLJ 518 on the indefeasibility of title as follows:

- A It is now trite law that upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s. 340(1) of the National Land Code). The phrase 'indefeasible title' means a title or an interest which is free of all adverse claims or encumbrances not noted in the register. It is quite obvious that the effect of registration is to
- B defeat all prior unregistered claims.

[16] His Lordship Raus Sharif went on to say at p. 146:

- C I now turn to s. 340(2). This carves out three circumstances in which the title of 'the person for the time being registered as proprietor' 'shall not be indefeasible'. In *Kesarmal & Anor v. Valliappa Chettiar* [1954] MLJ 119, the Privy Council held that the latter phrase means 'that the title of a proprietor is liable to be defeated'. A registered proprietor's title is – to use the words of the Judicial Committee – 'liable to be defeated' only in an
- D action brought for that purpose. In other words, there cannot be a collateral attack upon a registered title. This reinforces the point I made earlier in this judgment. It follows that s. 340(2) qualifies s. 340(1) to afford a registered proprietor interim protection of his or her title. Put differently, the title of a registered proprietor remains indefeasible until it is successfully impeached in
- E proceedings properly brought for that purpose by a person having *locus standi* to bring an action.

- [17] Following s. 340(1) of the National Land Code (NLC) and what had been expressed by His Lordship Raus Sharif as
- F recapitulated above, it is undoubted that the 1st defendant being the registered proprietor of the said land will have acquired an indefeasible title. This indefeasible title can only be defeated pursuant to s. 340(3) of the NLC under the three circumstances as set out in s. 340(2) of the NLC which provides:

- G (2) The title or interest of any such person or body shall not be indefeasible:
- H (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
- I (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
- (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[18] The plaintiff's case from the pleaded fact in his pleadings, seemed to rely on the circumstances described as (a) in s. 340(2) above with the allegation of collusion which may involve fraud which plaintiff had nevertheless failed to prove as he had pleaded. Circumstances (b) and (c) in s. 340(2) are not relevant herein as there is no such allegation. Conversely, the 1st defendant had been able to show with the relevant documents in bundle C pp. 26-44 that he had purchased the said land paying the full price of RM500,000 and as a consequence, his name was duly registered as the sole proprietor of the said land. The effect of this registration will defeat all prior unregistered claim: per Abdul Malek J (*supra*). There is absolutely no evidence from the plaintiff to prove how the 1st and the 2nd defendants had allegedly colluded to defraud him. Even assuming that the 2nd defendant had purportedly sold the said land to the plaintiff which however is not the plaintiff's pleaded case, there is still no evidence from the plaintiff to prove or to enable this court to draw a reasonable inference that the 1st defendant knew or ought to have known of such an alleged sale by the 2nd defendant to the plaintiff to render this court to arrive at a finding of fact of such an allegation of collusion. I must hold on a positive finding of fact that the plaintiff had failed to prove any of the circumstances under s. 340(2) particularly circumstances (a) of the NLC in order to defeat the indefeasible title of the 1st defendant. Consequently, I hold that 1st defendant's title to and his interest in the said land is indefeasible pursuant to s. 340(1) of the NLC.

4th Issue

[19] The undisputed fact is that plaintiff had filed the 1st suit with the cause of action identical to the current suit against the 2nd defendant and that the 1st suit was struck out on 15 March 2005 by the High Court, Penang pursuant to O. 18 r. 19(1)(b) and (d) RHC without an appeal being filed against such order. The 2nd defendant contended that the doctrine of *res judicata* applies to estop the plaintiff from resuscitating the same cause of action by filing a fresh suit against the 2nd defendant citing in support the salutary case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783 on this doctrine. For this contention, the 2nd defendant elected not to testify so as not to be construed that they were waiving their right on this issue. The plaintiff's explanation was that in the 1st suit, there was no

- A allegation of collusion (or fraud) being pleaded while it is so alleged in the present suit and the 1st suit was not heard on its merit. Nevertheless, he admitted that the two suits bear the same cause of action and both involve fraud.
- B [20] The doctrine of *res judicata* which has been extensively deliberated by His Lordship Peh Swee Chin SCJ in *Asia Commercial Finances* case is indeed well extracted by His Lordship Low Hop Bing JCA in *Chemfert Sdn. Bhd. & Anor v. Lim Hua* [2010] 7 CLJ 491 CA at pp. 501-504 therein from which I reproduce below the relevant few to the instant case:
- C
- (i) *Res judicata* simply means a matter adjudged and its significance lies in its effect of creating an estoppel per *rem judicatum*;
- D
- (ii) When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties who should accept it as the truth – *res judicata pro veritate accipitur*,
- E
- (iii) The public policy of the law is that it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium*;
- ...
- F
- (iv) The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time: per Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100 at 115; the ‘point’ should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties;
- G
- H
- ...
- I
- (ix) The well-known relevancy of a previous judgment in barring a second suit is seen in s. 40 of the Evidence Act 1950 ...
- ...

- (xii) In order to prevent a multiplicity of actions and also in order to protect the underlying rationale of estoppel per rem judicatum and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts and issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence ...

A

B

[21] On the point of “issue estoppel”, it was added:

- (xvii) *Res judicata* for this purpose is therefore not confined to the issues which the court is actually asked to decide, but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them ...

C

D

[22] The effect of *res judicata* relevant to the instant case is two prongs ie, it creates an estoppel of cause of action extending to all causes of action based on the same facts or issues which should have been litigated or asserted in the original earlier action resulting in the final judgment and which were not, either deliberately or due to inadvertence; and secondly, an issue estoppel which is not confined to the issues which the court is actually asked to decide but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. The cause of action in the 1st suit as in bundle C pp. 7-8 as compared to the current suit as in bundle A pp. 4-6 is substantially based on the same facts. The allegation of collusion or fraud which had not been so pleaded in the 1st suit should and ought to have been within the contemplation of the plaintiff. Hence whether he had deliberately or advertently failed to plead such a cause of action does not prevent the doctrine of *res judicata* from being invoked as such cause could have been brought forward at the 1st suit if plaintiff had only exercised reasonable diligence. Similarly, if the fact in issue is collusion or fraud, such issue is clearly the same, basing on the facts, as the subject matter of the plaintiff's case and could have been clearly raised. I find that *res judicata* applies squarely to estop the plaintiff in the cause

E

F

G

H

I

- A of action and/or issue or issues from re-litigation against the 2nd defendant. On the question of merit of the plaintiff's 1st suit not having been heard, I find that if the plaintiff did not accept the judgment or decision thereof, he should or ought to have taken action to file his appeal against the decision or to apply to set aside that decision before refiling the present suit. His failure can only be construed as his acceptance of the decision in the 1st suit as true and what had been deposed in the 2nd defendant's affidavit as the truth. Thus, I am inclined to hold that his filing of the current suit without having had the decision of the court in striking out of his 1st suit, set aside or reversed on appeal is *res judicata*. To echo the words of His Lordship Peh Swee Chin SCJ in *Asia Commercial Finance's* case, the public policy of the law is that it is in the public interest that there should be finality in litigation. It will be against public policy to allow the same cause of action to be re-litigated on the face of an existing valid judgment or decision.

5th Issue

- E [23] From the pleadings *vide* para. 4 of the statement of claim as reproduced above, the alleged contract between the plaintiff and the 2nd defendant in relation to the said land where the 2nd defendant was alleged to have given the plaintiff in consideration of the plaintiff delivering vacant possession of premises No. 458 - U, Mukim 13, Sungai Gelugor, Penang to the 2nd defendant, occurred sometime in or around 1974. If that is taken to be the time for the alleged concluded contract, then the plaintiff's cause of action would accrue from 1974 when the 2nd defendant breached their obligation to transfer the title to the plaintiff.
- F
- G [24] From the plaintiff's evidence in court, he claimed to have purchased the said land from the 2nd defendant and had purportedly paid the purchase price in full in the year 1991. When the 2nd defendant had failed in their obligation to transfer the said land to the plaintiff upon full payment of the purchase price, his cause of action would have accrued from 1991.
- H
- I [25] Learned counsel for the defendants submitted that whether plaintiff's action is based on contract or even for recovery of land as against the 2nd defendant it is time barred under s. 6(1)(a) or s. 9(1) of the Limitation Act 1953 (Act 254) since this action was filed exceeding the six years limitation under contract and 12 years

limitation for the recovery of land from the year 1991. On this point, if the years 1974 or 1991 are construed as the years on which the plaintiff's cause of action accrued, I am inclined to agree with the submission by the learned counsel for the defendants.

[26] However, if plaintiff's action is taken to be premised on fraud of the 2nd defendant, s. 29 of the Limitation Act 1953 will be applicable to postpone the limitation. It provides:

29. Where, in the case of any action for which a period of limitation is prescribed by this Act, either:

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agents; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequence of a mistake,

the period of limitation shall not begin to run until the Plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

...

[27] From the plaintiff's evidence *vide* para 4 in his witness statement exh. P1, he stated that around the year 2004 he came to know of the 2nd defendant's attempt to sell the said land to the 1st defendant and he lodged a police report *vide* Jelutong Report No. 8843/04. There is no other evidence to show that the plaintiff had discovered the alleged "fraud" or could have with reasonable diligence discovered it earlier than the year 2004. I am prepared to give the benefit of doubt to the plaintiff that by s. 29 of the Limitation Act 1953, the limitation period shall only begin to run from the year 2004 and not the earlier years as submitted. Hence when this action was filed in the year 2005, it was not time-barred. However, this finding is inconsequential when the plaintiff had as a whole failed to prove his claim against the defendants upon the positive findings by this court above.

A Failure To Testify By The 2nd Defendant

[28] Learned counsel for the defendants had elected not to call the 2nd defendant to testify endorsing that he understood the consequences of such election and the warning by this court. In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381, the Federal Court has held *inter alia*, the two consequences for such failure as follows:

- (1) Two consequences followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. Firstly, the evidence given by the appellant ought to have been presumed to be true. The judge was under a duty to accept the appellant's evidence as true in the absence of any evidence from the first respondent going the other way. ... Secondly, the court ought to have drawn an adverse inference against the first respondent ...

- [29] However, the 2nd defendant in the instant case elected not to lead any evidence on the ground that they contended and maintained that this present case is *res judicata* because of the 1st suit of the same nature filed by the plaintiff which had been struck out with no appeal by the plaintiff. If the 2nd defendant were to proceed to testify, that could be construed that they chose to waive their right over their pleadings that *res judicata* applied to estop the plaintiff from filing this second suit and by testifying, the 2nd defendant might be estopped from raising the doctrine of *res judicata*. To this court, the choice is on the 2nd defendant. The guiding principles laid down by the Federal Court above are still applicable if the 2nd defendant should fail in their contention. However, the fact that a defendant elects not to testify, does not relieve the plaintiff from his burden of having to prove his case in accordance with the standard of proof required by the law and in line with his pleaded case. Since the plaintiff herein had given evidence of an entirely different version of his alleged acquisition of the said land from his pleaded case for which this court must necessarily reject, the plaintiff had deprived this court of its duty to presume his evidence to be true and to accept his evidence as true. By failing to prove his own pleaded case, the plaintiff had given up his right for his evidence to be presumed to be true and to be accepted as true as against a non-testifying 2nd defendant. Similarly, an adverse inference drawn against the 2nd defendant would have no effect in the circumstances. Therefore, when the

plaintiff had failed to prove his case, the 2nd defendant was entitled to refrain from leading evidence but to submit of a no case to answer. When the plaintiff had failed in his burden of proof, I am of the view that there is no onus for the 2nd defendant to rebut.

Conclusion

[30] Having considered all the evidence and submission by both parties and even if this court were to err in holding that *res judicata* applies on ground that the actual merit of the case was not canvassed and argued, for the foregoing reasons, this court still holds that the plaintiff had glaringly failed to prove his case as he had pleaded. Consequently, the plaintiff's claim is dismissed with costs of RM7,000.

A

B

C

D

E

F

G

H

I